2020-2021 Edition

NEW LEGISLATION FOR 2021 AND 2020 CASES HANDBOOK

Fiore Racobs & Powers
A Professional Law Corporation

NEW LEGISLATION FOR 2021 & 2020 CASES

Presented by:

Fiore Racobs & Powers

NOTES:

I. **NEW LEGISLATION**

A. **Amendments and additions to the Davis-Stirling Common Interest Development Act, Civil Code Section 4000, et. seq. ("Act")**

1. **AB 3182, Ting. Housing: governing documents: rental or leasing of separate interests: accessory dwelling units.**

AB 3182 imposes additional limits on the authority of an Association to restrict rentals. The bill was one of several bills passed intended to increase the availability of affordable housing in California.

AB 3182 creates a new section of the Davis-Stirling Act, Civil Code Section 4741, with the following provisions:

- Governing documents may not *prohibit, have the effect of prohibiting*, or *unreasonably restrict* renting or leasing separate interests, ADUs, or JADUs. Civil Code Section 4740 already provides that governing documents may not prohibit renting or leasing units. AB 3182 does not further define "unreasonable restriction," although it includes some specific provisions.

- One specific provision states that associations may not limit rentals to less than 25% of the separate interests.

- Another specific provision provides a safe harbor by stating that an association may prohibit transient or short-term rentals of 30 days or less.

- The bill also states that a separate interest, ADU or JADU is not considered a rental "if occupied by the owner," so a lot does not count toward the rental cap if the owner lives in the main residence, and ADU or JADU.

- Associations are *required to amend their documents* to conform to the provisions of the statute by December 31, 2021.

- If an association willfully violates this statute, it is liable for actual damages to the "applicant" (presumably the owner who seeks to rent out their property) or another party and a civil penalty of up to $1,000.00.

- Finally, an owner who acquired title prior to the statute's effective date retains their right to rent or lease.

AB 3182 makes one substantive change to Civil Code Section 4740 by deleting the provision allowing an owner to consent to be bound by rental limitations even if they purchased their property before the law's effective date.

Significance to CID Industry

- CC&Rs may need to be updated by the December 31, 2021, deadline to be in compliance with the law. It is advised to consult with legal counsel.

B. **Amendments and additions to other State Laws**

1. **SB 908: Debt collectors: licensing and regulation: Debt Collection Licensing Act.**

The new Debt Collection Licensing Act (Financial Code §100000, et seq.) was enacted so that beginning January 1, 2022, no person shall engage in the

NOTES:

business of debt collection without first obtaining a license under the Debt Collection Licensing Act ("DCLA"). The DCLA uses the same definitions as are in the Rosenthal Fair Debt Collection Practices Act (Civil Code §1788, et seq.; "Rosenthal Act"), except that under the Rosenthal Act, attorneys are specifically excluded from the definition of a debt collector, but under the DCLA they are not carved out. Cases have interpreted the Rosenthal Act to apply to community association assessments, but not to fines.

Debt collectors will be required to apply for and obtain a license in order to engage in debt collection. Applicants will be required to pay a fee and submit to a criminal background check. Licensees must comply with reporting and examination requirements and must maintain a surety bond. It is permissible for multiple individuals to use one corporate license.

Unlike the federal Fair Debt Collection Practices Act, debt collectors need not be collecting the debt *of another*, so **associations that are self-managed are likely going to be included as debt collectors, as will management companies**.

The Rosenthal Act (Civil Code §1788.11) is amended to provide that no telephone call can be placed by a debt collector without disclosure of the caller's identity, and §1788.52 is amended to provide that all digital and written communications must display the license number of the debt collector in at least 12-point type.

Significance to the CID Industry:

- Any association that collects assessments on its own behalf will require a debt collection license from and after 1/1/2022.
- Any management company that collects assessments on behalf of associations will require a debt collection license from and after 1/1/2022.
- All statements, late letters and other notices regarding assessments must include the debt

NOTES:

collection license number of the debt collector sending the statement, letter or notice from and after 1/1/2022.

2. **SB 1159 (Hill) Workers' compensation: COVID-19: critical workers.**

Adds Section 77.8 to, and adds and repeals Sections 3212.86, 3212.87, and 3212.88 of the Labor Code. Approved by the Governor on September 17, 2020, and took immediate effect, but expires on January 1, 2023.

- Defines "injury" for an employee to include illness or death resulting from COVID-19 under specified circumstances until January 1, 2023.

- Creates a disputable presumption that the injury arose out of and in the course of the employment. Creates 3 categories:

  1. Any employee who reported to their place of employment between March 19 and July 5, 2020, and who tested positive for or was diagnosed with COVID-19 within the following 14 days during that time period;

  2. Extends the presumption beyond July 6, 2020, for certain public safety employees and health care workers;

  3. All other employees only if the employee works for an employer with 5 or more employees, and the employee tests positive for COVID-19 within 14 days of an "outbreak."

- An "outbreak" = if within 14 calendar days one of the following occurs at a place of employment.

  - 4 employees test positive for COVID-19 at place of employment with 100 or less employees;

NOTES:

- 4% of the number of employees who reported to the place of employment test positive for COVID-19 at place of employment with more than 100 employees; or

- Place of employment is ordered to close by certain government agencies due to a risk of infection with COVID-19.

- A claim relating to a COVID-19 illness is presumptively compensable after 30 days or 45 days (for an "outbreak") rather than 90 days (previous time frame to reject).

- An employer must report that an employee has tested positive for COVID-19 to their workers' compensation claims administrator in writing (via email or fax) within 3 business days. Failure to report or intentionally submitting false or misleading information may result in a civil penalty of up to $10,000.

Significance to CID Industry

- Employers should be prepared to respond to reports that an employee has contracted COVID-19 and establish a protocol for reporting and responding to potential workers' compensation claims.

- Consult workers' compensation insurance agent.

3. **AB 685 (Reyes) COVID-19: imminent hazard to employees: exposure: notification: serious violations.**

The California Occupational Safety and Health Act of 1973 requires the Division of Occupational Safety and Health ("Division") to protect and improve the health and safety of employees by, among other things, setting and enforcing health and safety standards. In light of the COVID-19 pandemic, AB 685, which was signed into law on September 17, 2020, and takes effect January 1, 2021, changes 3 sections of the Labor

NOTES:

Code as it relates to COVID-19 and imminent hazard to employees, exposure and notification thereof, and serious violations.

NOTES:

Labor Code 6325 – Imminent Hazard

- The changes implemented by AB 685 mirror already existing law, but carve out a COVID-19-specific provision.

- Adds that if any place of employment, operation, or process exposes workers to the risk of infection with COVID-19, so as to constitute an *imminent hazard to employees* – the performance of such operation/process, or entry into such place of employment – may be prohibited by the Division.

- This provision will remain in effect until 1/1/23, and as of that date is repealed.

    - Upon repeal of the COVID-19 section on 1/1/23, Labor Code Section 6325 reverts back to the pre-AB 685 language.

Labor Code 6409.6 – Exposure & Notification

- If an employer or its representative receives notice of potential exposure to COVID-19, the employer shall take ALL of the following steps within 1 business day of the notice of potential exposure:

    - **Provide Written Notice**

        - To all employees and the employer of subcontracted employees who were on the premises at the same worksite as the qualifying individual within the infectious period that they may have been exposed to COVID-19.

        - The written notice must be in a manner the employer normally

uses to communicate employment-related information, which may include: email, text, or personal service if it can be reasonably anticipated to be received by the employee within 1 business day of sending.

        - The notice shall be in English and in the language understood by the majority of employees.

    - Provide all employees who may have been exposed with information regarding COVID-19-related benefits to which the employee may be entitled under applicable federal, state or local laws, (such as worker's comp, COVID-19-related leave, company sick leave, state-mandated leave, supplemental sick leave, etc.).

    - Notify all employees and employers of subcontracted employees and the union rep on the disinfection and safety plan that the employer plans to implement and complete per the guidelines of the federal Centers for Disease Control.

- If an employer or its rep is notified of the number of cases that meet the definition of a COVID-19 outbreak as defined by the State Department of Public Health, within 48 hours the employer shall notify the local public health agency in the jurisdiction of the worksite of the names, number, occupation, and worksite of employees who are qualifying individuals.

- The employer cannot:

    - Require employees to disclose medical records.

    - Retaliate against a worker for disclosing a positive COVID-19 test or diagnosis.

NOTES:

- Employer shall maintain records of the written notifications required in subdivision (a) for a period of at least 3 years.

- Cal/OSHA shall enforce Subdivision (a) by the issuance of a citation alleging a violation of these paragraphs and a notice of civil penalty.

- Remains in effect until 1/1/23, and as of that date this section is repealed.

Labor Code 6432 – Serious Violations

The changes implemented by AB 685 carve out specific exemptions to provisions of this Code Section for serious violations relating specifically to COVID-19.

- Under existing law, before a citation is issued for a "serious violation" the Division must make a reasonable attempt to determine and consider certain facts, such as: training for employees/supervisors in preventing employee exposure to the hazard or similar hazards; procedures for discovering, controlling access to, and correcting the hazard; procedures for communicating to employees about the employer's health and safety rules/programs; the employer's explanation of circumstances; why the employer believes a serious violation does not exist, etc.

    - This investigative requirement is satisfied if the Division sends, at least 15 days before issuing a citation, a standardized form containing descriptions of the alleged violation the Division intends to cite as serious and clearly soliciting the above-described information.

    - AB 685 amends Labor Code 6432 so that the 15-day pre-citation inquiry does not apply to alleged violations dealing with COVID-19.

NOTES:

- Under existing law, if an employer does not provide information in response to the Division's above-mentioned inquiry, the employer will not be barred from presenting that information at the hearing and no negative inference shall be drawn. Different information may be presented at the hearing than what was provided in response to the 15-day inquiry.

    - AB 685 amends Labor Code 6432 so that this section does not apply to citations alleging a serious violation relating to COVID-19.

- This section will remain in effect only until 1/1/23, and as of that date is repealed.

    - Upon repeal of the COVID-19 section on 1/1/23, Labor Code Section 6432 reverts back to the pre-AB 685 language.

Significance to CID Industry

- These changes only affect associations who have employees/subcontractors.

- Given the short notice periods required by this section, associations should consider having templates drafted which set forth the notice requirements as required by the changes implemented by AB 685.

- The COVID-19 exposure notice requirements are for employees only. The association is not required by these code sections to notify members of the Association of potential exposure, however, also notifying members/guests of such exposure may be prudent.

C. **California Code of Regulations Sections 3120B.4 and 3120B.7 (Title 24-The California Building Standards Code) -** Effective January 1, 2020.

As a reminder, the California Code of Regulations were updated:

NOTES:

1. **3120B.4 No Lifeguard Sign**

Where no lifeguard service is provided, a sign shall be posted stating, "NO LIFEGUARD ON DUTY." The sign also shall state in letters at least 1 inch (25 mm) high, "Children should not use pool without adult supervision."

2. **3120B.7 Warning Sign for a Spa Pool**

A warning sign for spa pools shall be posted stating, "CAUTION" and shall include the following language in letters at least 1 inch (25 mm) high:

1. Elderly persons, pregnant women, infants and those with health conditions requiring medical care should consult with a physician before entering the spa.

2. Children should not use spa without adult supervision.

3. Hot water immersion while under the influence of alcohol, narcotics, drugs or medicines may lead to serious consequences and is not recommended.

4. Do not use alone.

5. Long exposure may result in hyperthermia, nausea, dizziness or fainting.

D. **State Administrative Regulations**

The State of California Department of Fair Employment and Housing ("DFEH") has now proposed new Fair Housing Regulations that will amend the Fair Housing Regulations that became effective 1/1/20.

Some of the more important proposed additions are:

- Adding provisions that will now define ADUs, short term rentals of units/rooms, and Airbnb as "Housing Accommodations"/"dwellings" and include the operators/offerors of those as housing providers.

- Adding new liability for intentional discrimination and in instances where the protected class is a motivating

NOTES:

factor in the discriminatory housing practice (doesn't have to be motivated solely by discriminatory intent).

- Adds new provisions regarding discriminatory practices on notices, statements and advertising. It will be unlawful to use words, photographs or forms to convey that dwellings are not available to a particular group based on being a member of a protected class.

- Examples in the Regulations include potential discrimination based on familial status for use of "children allowed" or "not suitable for children" and potential discrimination based on disability for the use of "active living" even for housing for older persons.

- Discriminatory notices or statements include adding or including language in any declaration, governing document, deed or similar document that expresses a preference, limitation, discrimination or prohibition based on a protected class, including any conduct in violation of section 12956.1 of the Act regarding discriminatory restrictive covenants.

- This means that associations that don't include the cover sheet required by Government Code Section 12956.1 have potential liability under the new Regulations.

- See new Section 12956.1 cover sheet, which as of 1/1/20 was changed to add veteran or military status as a protected class (attached in 18 point bold font – statute requires a minimum of 14 point bold font).

- The new Regulations will not consider it to be discriminatory conduct to have advertisements, notices, etc. requiring occupants to be a certain age if the association qualifies as housing for older persons under the State and Federal acts. The burden of proof will be on the respondent to provide that the housing qualifies as housing for older persons.

- The proposed Regulations also add new sections, including definitions, regarding reasonable modifications to the existing provisions on reasonable accommodations.

NOTES:

- The new definition sections will provide:

  (a) A reasonable accommodation is an exception, change, or adjustment in rules, policies, practices, or services when such an accommodation may be necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity.

  (b) A reasonable modification is a change, alteration or addition to the physical premises of an existing housing accommodation, at the expense of the person with a disability or their designee, when such a modification may be necessary to afford the individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity. (Section 12176) The proposed Regulations specifically address the requirements for common interest developments as follows:

  "The prohibitions and requirements of this section apply to common interest developments, except that homeowners (members of the common interest development) may:

  (1) As of right, make any improvement or alteration within the boundaries of the member's separate interest that does not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development.

  (2) Modify the member's separate interest, at the member's expense, to facilitate access for people with disabilities or to alter conditions which could be hazardous to people with disabilities in accordance with the Davis-Stirling Common Interest Development Act. However, to the extent the Davis-Stirling Common Interest Development Act requires or permits any action that would be an unlawful practice under this section, it is rendered invalid by the Fair Employment and Housing Act.

  (3) Modify public and common-use areas at the member's expense, subject to a request for reasonable modifications under this Article. To the extent the Davis-Stirling Common Interest Development Act requires or permits any action in regard to such

NOTES:

modifications that would be an unlawful practice under this section, it is rendered invalid by the Fair Employment and Housing Act.

(e) No restoration of either the member's separate interest or the public and common areas shall be required in common interest developments since the obligation to restore the premises at the end of the residency is limited to tenancies.

- For the first time there is a common interest development example in the proposed Regulations:

  Aki owns a condominium unit. Aki is deaf and would like to install a blinking doorbell to their unit. This requires modifications to the front doorbell to the condominium complex and to the doorbell in Aki's unit. Aki has arranged for a community organization to pay for the modifications. Aki asks the homeowners' association permission to make the modifications. It is unlawful for the owners' association to refuse to permit Aki to make the modifications, regardless of any provisions in the common interest development's governing documents. The source of the funding for the modifications is irrelevant. Further, the homeowner's association may not condition the approval of the modifications by requiring restoration of the former doorbells when Aki sells the condominium unit, because restorations can only be required for rental unit modifications. The owners' association can require that Aki provide reasonable assurances that the work will be done in a competent manner and that any required building permits will be obtained.

Significance to CID Industry

- The new DFEH Fair Housing Regulations will address intentional discrimination in housing matters.
- There would be liability for discrimination in advertising and notices.
- New definitions of reasonable accommodation and reasonable modifications.

NOTES:

- Changes made by owners may not be conditioned on returning the common area to its original condition.

NOTES:

II. NEW CASES FROM 2020

A. ***Coley v. Eskaton*** (2020) 51 Cal.App.5th 943, 264 Cal.Rptr.3d 740**:** Homeowner brought suit against HOA, directors, and directors' employees alleging directors ran HOA for benefit of entity that develops CIDs for older adults.

The Eskaton entities are related corporations that develop and support common interest developments for older adults in Northern California. Ronald F. Coley owns a home in one of their developments, Eskaton Village Grass Valley (the Village). He brought this suit against the Village's Homeowners Association, two of the directors on the Association's board, and the directors' employers (the Eskaton entities), alleging these directors ran the association for the benefit of the Eskaton entities rather than the Association and its members. The trial court agreed with Coley in part, finding these directors breached their fiduciary duty to the homeowners Association and its members in several respects. In particular, the trial court found one director improperly shared with the Eskaton entities the Association's privileged communications with its counsel, and both directors, in violation of the Association's governing documents, approved certain assessments that benefited the Eskaton entities and harmed many of the Association's members. Based on this conduct, the trial court found the directors' employers, the Eskaton entities, were liable for any damages Coley suffered as a result, though it declined to find the directors liable in their personal capacities. It awarded Coley damages of $2,328.51 and attorney fees of $654,242.53. Both parties appealed.

The most important issue addressed by the Appellate Court relates to the contention by the Eskaton entities and the two director defendants that the trial court should have afforded the defendants more deference under the business judgment rule.

Background Information:

The Village consists of 130 homes known as the Patio, which are owned by individual homeowners, such as Plaintiff Coley, and 137 rented residences known as the Lodge. The Lodge is

owned by Eskaton Village. Both the Patio and the Lodge are governed by the Eskaton Village, Grass Valley Homeowners Association ("Association").

The Association has a five member board. Since the Association's inception, Eskaton Village has controlled three out of the five seats on the Association's board. Under the CC&Rs, the owners of the 267 housing units (the 137 Lodge residences and 130 Patio homes) are entitled to one vote per housing unit owned. Because Eskaton Village owns a majority of these units (137 of 267), it holds a perpetual voting majority. At least two of the three directors who were appointed by Eskaton Village were financially incentivized to increase the profitability of the Lodge for the benefit of Eskaton Village.

Business Judgment Rule Discussion:

The defendants claimed the trial court misapplied the business judgment rule. In this case, the trial court found the rule inapplicable because the Eskaton entities' employees who sat on the Association's board had an "irreconcilable conflict of interest" in that the director defendants' financial interest was personal and distinct from that enjoyed by the Association members generally. This irreconcilable conflict of interest "preclude[d] the business judgment rule as a defense to liability in this case."

The Court found that the trial court correctly explained that directors acting under a conflict of interest cannot obtain the benefit of the business judgment rule. Although a conflict does not necessarily establish actionable impropriety, it shifts the burden to the director to show the transaction was just and reasonable. The Court further stated that majority directors who approve transactions while operating under a material conflict of interest are faced with a situation of divided loyalty that requires that they show the approved transaction was "fair and reasonable" – meaning they must not only "prove the good faith of the transaction but also … show its inherent fairness from the viewpoint of the corporation and those interested therein."

Side Issue:

The Court also took the time to point out that the directors' failure to comply with the Association's CC&Rs was mismanagement. "It may not have been pervasive mismanagement. It may not have been egregious

NOTES:

mismanagement. But an unlawful failure to abide by an association's governing documents is mismanagement to some degree nonetheless."

Important Take Away

Directors acting under a conflict of interest cannot obtain the benefit of the business judgment rule. Conflicted directors must not only prove the good faith of the transaction but also show its inherent fairness from the viewpoint of the corporation and those interested therein. Additionally, the Court stated that an unlawful failure to abide by an Association's governing documents is mismanagement.

B. ***Aldea Dos Vientos v. CalAtlantic Group, Inc.*** (2020) 44 Cal. App. 5th 1073, 258 Cal. Rptr. 3d 285: Construction defect claim, developer filed motion to confirm arbitrator's dismissal of arbitration.

In this case, the association filed a demand for arbitration against the developer alleging construction defects. The association's governing documents required arbitration of such disputes and a vote of at least 51 percent of the association's membership prior to beginning arbitration. The association began arbitration without obtaining a vote of its members. Later, the members overwhelmingly voted to pursue the arbitration. The arbitrator dismissed the arbitration for lack of a membership vote prior to its commencement. The trial court confirmed the award and entered judgment for the developer.

The Court of Appeal reversed holding that the provision in the governing documents requiring a vote in order to initiate a construction defect claim was unreasonable as it contravened public policy by giving the developer the unilateral power to bar actions for construction defects.

The Court of Appeal disapproved of the arbitrator's and trial court's decision because it essentially permitted the association to forever forfeit its right to pursue its claims in any forum in spite of an overwhelming ratifying vote. The Court of Appeal held the provision violates public policy as it amounts to a trap for the unwary set by the developer to bar claims against it. The developer is burdened with no similar hurdle prior to seeking a determination of its rights.

NOTES:

The Court further held that provisions like this one that impose preconditions such as requiring a membership vote are unconscionable pursuant to Civil Code Section 5986, which took effect on January 1, 2020.

Important Take Away

Any provision in the governing documents requiring a membership vote before initiating a construction defect case against the developer violates public policy and is unenforceable, null and void.

C. ***Nathan Brooks Parnell v. Lih Bin Shih***: restraining order case.

Unpublished - 2020 WL 1451931

Parnell and Shih were neighbors in a homeowners association. Parnell was a tenant and Shih and owner. Parnell was awarded a restraining order against his neighbor Shih. The trial court's order granting the restraining order found that Shih "was reaching a level of unhealthy obsession in monitoring almost every movements and action taken by [the Parnells] and was clearly invading [the Parnells'] privacy through stalking, harassment and the filing of unwarranted complaints with the HOA and the Marine Corps." (Parnell was employed by the Marine Corp.) The trial court went on to find that "approximately 300 unwanted e-mails from [Shih] on issues that were mundane and designed to simply inflict distress/harassment upon [the Parnells]" along with Shih consistently invading the Parnells' personal space in the common areas constituted interference with the Parnells' life, Mr. Parnell's work and was unreasonable and unwarranted. The e-mails from Shih included almost daily e-mails to the HOA with a copy to Parnell. Shih sent numerous e-mails to Parnell's Marine Corps Commander. The trial court made specific mention of a 28-page complaint letter from Shih to the Marine Corp as evidence Shih was clearly intending to interfer with Parnell's employment. The trial court's restraining order directed Shih no to harass or contact the Parnells, to say five yards away from the Parnells, to stay 100 yards away from the Parnells' dog, and prohibited Shih from contacting the Marine Corps.

Shih appealed the restraining order on various grounds. One of her claims was that she sent less than 300 e-mails. She also

NOTES:

claimed the court's prohibition against her contacting the Marine Corps violated her free speech rights. The Court of Appeal noted that while it did appear the number of e-mails sent by Shih was less than 300, regardless of what the total number was, the barrage of e-mails and their content were sufficient to support the finding of harassment. On the free speech claim, the Court of Appeal noted that under California law, speech that constitutes harassment is not constitutionally protected and there was no legitimate purpose for Shih's communications to the Marine Corps about Parnell. However, the Court of Appeal did not that the prohibition against any contact with the Marine Corps was overbroad and held that Shih should only be prohibited from contacting the Marine Corps about Parnell.

This case did not involve a homeowners association directly. But, it is a reminder that harassing conduct can include what the Court of Appeal referred to here as a "barrage of e-mails" that were derogatory and served no legitimate purpose. The Court of Appeal did note that contacting an HOA about enforcement of rules could be a legitimate purpose, but that Shih's "daily, lengthy, derogatory e-mails to the HOA were seriously harassing and had no legitimate purpose."

D. **Kristine Byron v. *Rene Mccray*:** civil harassment restraining order case.

Unpublished - 2020 WL 5587910

Kristine Byron sought a civil harassment restraining order (pursuant to CCP Section 527.6) against her neighbor, Rene McCray. The two lived in a condominium association five units apart, and they shared a driveway with 13 other residents.

Ms. Byron sought the restraining order on the basis that Mr. McCray harassed her since 2005, recounting times he yelled insults and displayed anti-Semitic behavior towards her. She also described 3 different incidents where she felt threatened by his behavior. (According to Ms. Byron, Mr. McCray called her names, threatened to kill her, screamed accusations at her and drove his vehicle at a high speed within two feet of where she was standing).

The court granted the permanent restraining order for 3 years, stating that although Ms. Byron did not produce clear and

NOTES:

convincing evidence of a credible threat of violence, the court relied on the 3 incidents she described and found "yelling, name-calling, and... speeding closely by" were actions directed at Byron that "served no legitimate purpose" and were "intended to alarm, harass, or annoy" her. Mr. McCray appealed, contending that the court's findings were not supported by the evidence, the findings were legally insufficient to meet the statutory requirements of CCP Section 527.6, and that the court abused its discretion in excluding evidence about Ms. Byron's alleged motive in seeking a restraining order. The appeals court affirmed.

Important Take Away

- Plaintiff can prevail by showing evidence of a "course of conduct" that serves "no legitimate purpose" that is "intended to alarm, harass, or annoy."
- Importance of the credibility of witnesses.

E. ***Carmichael Canterbury Village Owners Assoc. v. Michael Joseph***: dispute with HOA re: architectural modifications.

Unpublished – 2020 WL 501527

Appellant Michael Joseph engaged in disputes with the Carmichael Canterbury Village Owners Association (HOA) about architectural modifications he wanted to make in order to sell a home for a quick profit. The case proceeded to trial on Joseph's cross-complaint against the HOA after the HOA dismissed its complaint against Joseph. The jury in a special verdict found that an HOA "hearing" to discuss Joseph's CC&Rs violations did not violate due process, but the HOA did breach its contract (Covenants, Conditions, and Restrictions or CC&Rs) and its fiduciary duty and intentionally inflicted emotional distress.

The only issue that is really of any import is the discussion of Joseph's due process complaint regarding the hearing. The HOA hearing was held pursuant to Civil Code § 5855. The trial court provided a jury instruction that said Joseph must prove that the HOA "intentionally convened a hearing without written notice that contained at a minimum the date, time and place of the meeting, the nature of the proceedings and that Mr. Joseph had the right to attend and address the board at the meeting."

NOTES:

NOTES:

On appeal, Joseph argued that his due process claim raised issues of procedural and substantive fairness (constitutional and common law) apart from the right to receive notice of the hearing, and the court erred in failing to so instruct. Procedurally, he complained he was not notified in advance of what evidence and arguments the Board might present, was not notified he could bring an attorney, and was subjected to an unfair "grill[ing]" by the HOA's attorney. Substantively, Joseph complained that, of the three-member HOA board, two were biased due to their status as complainants/witnesses as well as decisionmakers.

The Court held that the Davis-Stirling Act contains several other provisions that work to provide the "fairness" about which Joseph complains, including the provisions related to IDR and ADR, and that Joseph failed to avail himself of his rights in respect to these other provisions. The Court further held that the HOA was not required to do more than follow the statute in relation to the notice of hearing, the conduct of the hearing, and providing Joseph with the opportunity to engage in both IDR and ADR, which he refused.

Important Take Away

So long as the HOA complies with the specific notice requirements of Civil Code § 5855, it is not required to provide a homeowner with advance notice of what evidence and arguments the Board might present in order to conduct a legally-correct hearing. Additionally, possible due process concerns are also alleviated by the requirement that the HOA agree to engage in IDR and/or ADR prior to any lawsuit being filed.

F. ***Theodore Maravich v. Dover Shores Community Assoc*.:** View impairment case involving HOA.

Unpublished - 2020 WL 1061065

Homeowner filed a lawsuit against Dover Shores alleging the Association failed to enforce the view-impairment provisions of the CC&Rs. The homeowner indicated he has panoramic views of the Back Bay wetlands, Saddleback Mountain, city lights and other scenic vistas. The homeowner alleged the landscaping on the lots below had grown so as to partially block his view. The was the second lawsuit filed by this

homeowner against Dover Shores. The first lawsuit was settled in 2013, with Dover Shores agreeing to have some palm trees on another owner's lot removed and to pay Maravich $120,000. This second lawsuit was sparked by a change adopted by Dover Shores to its landscaping rules regarding views. The second lawsuit asserted the rule change was not consistent with the CC&Rs and further sought a ruling that Dover Shores did not have the discretion to permit tall trees that interfered with another owner's view.

Prior to the rule change, the rules provided that the Association could require a lot owner to take action to trim, top or remove a tree or shrub where the tree or shrub "impedes or detracts" from a view. The "impedes or detracts" language was the same as the language in the CC&R provision about when the Association could require trimming, topping or removal. The rule change deleted "impedes" from a view, referencing the Association's intent not to take action where the only claim is that a tree "impedes" a view. The Association has historically permitted 1 tall palm tree per lot and was worried that owners (like Maravich) would claim a tree needed to be topped or removed based on a literal interpretation of impede, i.e., any tree that comes between a person and the thing being looked at impedes a view, even if from a more subjective standpoint the tree does not detract from the view.

The trial court ruled in favor Dover Shores regarding authority to permit tall trees that inferred with a view, but ruled in Maravich's favor regarding the rule change. The trial court also ruled that Dover Shores was the prevailing party and court awarded attorneys' fees of $390,668.

The Court of Appeal upheld the trial court rulings in favor of Dover Shores, and overturned the one ruling in favor of Maravich as to the rule change. The Court of Appeal found that the rule change was permissible as an exercise of Dover Shores' discretion. The Court of Appeal noted that the CC&R view provision at issue gave Dover Shores the right, but not the duty, to require topping, trimming or removal in situations where an owner claimed a view was being impeded or detracted from, and that Dover Shores was entitled to decide, via rule, how it would exercise that right The Court of Appeal also upheld the trial court's decision to award Dover Shores $390,668 in attorneys' fees.

NOTES:

Attachment (referenced on page 11):

"If this document contains any restriction based on race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, veteran or military status, genetic information, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to Section 12956.2 of the Government Code. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status."

Government Code Section 12956.1

Fiore Racobs & Powers

A Professional Law Corporation

Established in 1973, Fiore Racobs & Powers celebrates over 47 years as The Recognized Authority In Community Association Law. We are a full-service law firm, providing complete representation of common interest developments including: CC&R and Architectural Enforcement, Document Amendment, Elections/Votes, Corporate Counsel, Legal Opinions, Assessment Collection, Litigation, Appeals & General Legal Services.

Our Firm's ongoing mission is to "Provide quality legal services to our clients while setting the example for others to follow in the legal community. We are dedicated to the success of community associations through the practice of law, the education of our clients and industry professionals, and the advancement of public policy."

> **The Firm's Common Interest Development Mini-Legal Dictionary is now available for download on our website at FIORELAW.COM/Resources.**

FioreLaw.com

877-31-FIORE

Fiore Racobs & Powers

A Professional Law Corporation

Celebrating Over 47 Years as The Recognized Authority In Community Association Law

> Orange County Office

6440 Oak Canyon
Suite 250
Irvine, CA 92618
949-727-3111
Fax 949-727-3311

> Coachella Valley Office

74-130 Country Club Drive
Suite 102
Palm Desert, CA 92260
760-776-6511
Fax 760-776-6517

> Inland Empire Office

6820 Indiana Avenue
Suite 140
Riverside, CA 92506
951-369-6300
Fax 951-369-6355

> San Diego County Office

380 S. Melrose Drive
Suite 330
Vista, CA 92081
760-707-1988
Fax 760-776-6517

FIORELAW.COM

877-31-FIORE